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No._____

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PORTLAND WOOD PIPE COMPANY,
A CORPORATION,
Appellee,

vs.

CRANE CREEK IRRIGATION DISTRICT,
A CORPORATION,
AND
SUNNYSIDE IRRIGATION DISTRICT,
A CORPORATION,
Appellants.

Brief for Appellants.

C. S. VARIAN,
E. R. COULTER,
Solicitors for Crane Creek Irrigation District and Sunnyside Irrigation District, Appellants.

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Brief for Appellants.

This is an appeal from a decree from the District Court of the United States for the Southern District of Idaho, Southern Division, charging a mechanic's lien against the irrigation system of appellants, and directing a foreclosure and sale thereof in default of a satisfaction of the amount found to be due the appellee for materials furnished a sub-contractor upon the construction of a certain portion of the system.

On November 7th, 1914, the appellee, Portland Wood Pipe Company, exhibited its Bill of Complaint in the said District Court to foreclose an alleged mechanic's lien against the interest of appellants in a certain irrigation

system common to both districts. It impleaded as defendants, these appellants, Slick Brothers Construction Company (hereinafter called "Construction Company"), Crane Creek Land & Power Company (hereinafter called "Company"), Maney Brothers & Company, a co-partnership, and others. The Construction Company answered the bill and filed a cross bill which, upon the hearing, was finally dismissed. The several cross bills of the other defendants, with the exception of that of Maney Brothers & Company were also dismissed, and the only defendants interested in this appeal are appellants.

The bill of appellee alleged that the Construction Company on or about April 2nd, 1913, entered into a contract in writing with the defendant Company for the construction of the irrigation system, etc., alleged in the bill to be owned by the Company, but that the Districts owned or claimed to own some interest therein, and that the same was on November 8th, 1913, supplemented and modified by another agreement between the parties; that the Construction Company entered upon the construction of the work and while so engaged on or about February 9th, 1914, purchased from the appellee, Portland Wood Pipe Company, for use in the construction of the said irrigation system, works and structures, certain material to be used in the erection thereof, particularly describing the same with accompanying prices; that deliveries of said material were made in accordance with said contract; that the last material was shipped on March 18th, 1914, and delivered a few days thereafter to the Company and was actually used by the Company in the construction of the said system; that certain extra materials and supplies were also on or before March 17th, 1914, delivered to the Construction Company, and also used in

the construction of the said system. (Transcript, 2, 14, 15, 20.)

The bill prayed that a mechanic's lien be charged against the system, and that a decree be passed foreclosing the lien and for sale of the premises. (Transcript, 24.)

The answers of appellants denied the ownership by the Company of the irrigation system, etc., admitting, however, that it owned 30.4 per centum of the said system lying outside the boundaries of the two irrigation districts. (Transcript, 48-63.)

The answers further alleged that each of the appellants was a public corporation and organized as an Irrigation District, and that under the laws of the State, no lien attached or could be charged against the irrigation system, the property of appellants. (Transcript, 53-68.)

A decree was given for the amount claimed, with attorney's fees and costs, and for the satisfaction thereof, charging "All the right, title and interest of Appellants in and to the irrigation system, including a reservoir and site, and all canals, ditches, head gates, flumes, pipe lines, laterals, and other structures, dams and works used, or intended to be used or required in connection with the distribution of the water from said reservoir and carrying and distributing water to the place or places of intended use; and all rights of way therefor, and particularly that certain canal on the southerly side of Crane Creek," (here follows a particular description of the canal and description of the lands which it crosses); "also all water rights and rights to the use of the water in connection with the reservoir and irrigation system, works and structures, hereinbefore described, acquired by said defendants, Sunnyside Irrigation District and

said Crane Creek Irrigation District, under their several contracts with the defendant, Crane Creek Irrigation Land & Power Company, and particularly the interest of the said Districts in the following permits issued by the State Engineer of the State of Idaho to the said Crane Creek Irrigation Land & Power Company''; (describing six permits by number, record, and date). (Transcript, 198, 200, 201, 202.)

The decree also charged the lien upon all the interest of the Company in the irrigation system, declared to be 30.4 per cent, subject to the prior mortgage lien of Maney Brothers & Company.

It was further decreed that unless payment of the sums of money found to be due to Portland Wood Pipe Company were paid within thirty days, all of the property hereinbefore described be sold as an *entirety* and in one *parcel,* without value or appraisement, subject to the prior lien of a certain mortgage of Maney Brothers & Company upon the interest of the Company in the property, at public vendue, with right of redemption within three months after sale. (Transcript, 203, 204, 216.)

The questions made upon this appeal are whether a material man's lien under the laws of Idaho may be charged against the irrigation system of these appellants or any part thereof, and whether under said laws, any part of the said property may be sold at public sale for the satisfaction of any such alleged lien.

STATEMENT OF THE CASE.

On August 22nd, A. D. 1910, each of the appellants, Sunnyside Irrigation District and Crane Creek Irrigation District, entered into a contract in writing with the Company, and the Sunnyside District contract was re-

ceived in evidence as District's Exhibit "B," but through an oversight of the clerk or the printer, was not embraced in the printed transcript of the record herein, although the precipe called for its insertion. (Transcript, 238.) It is, however, set out at large in the transcript of record upon the appeal of Maney Brothers & Company in this case on pages 101 to 121, both inclusive. There is also a stipulation between the solicitors for the respective parties to this appeal, that all original exhibits introduced in the cause may, with the consent of the court, be transmitted to the clerk of this court before the hearing of the cause here, and may be used upon the argument or the hearing, and shall be considered as part of the record as fully and to the same extent as if transcribed and printed in the record; and that appellants may, if it be deemed necessary by this court, print such exhibits as part of the record not included in the statement of the evidence as settled and allowed. (Transcript, 82.) The said contract is referred to in the testimony of witnesses Coulter and Ford. (Transcript, 75-80.) Exhibit "B" will be printed and certified to this court. It was stipulated that the contracts made between the Districts and the Company were identical, save as to the respective interests of the Districts. (Transcript, 73, 74.) Since, however, this contract is the original contract of construction through which the appellee, as a sub-contractor, derived the right to charge its lien against the Districts' property, and is before this court upon another appeal in this case in which the question of the right to charge the property with a mortgage lien is presented, we therefore assume there will be no objection to referring in this brief to the record on the appeal by Maney Brothers & Company

for knowledge of its contents. This contract recited that the Company was the owner of a partially constructed irrigation system consisting of a dam site, reservoir, dams, canals, and other structures being constructed for the purposes of storing, impounding, diverting and distributing certain waters, and was also the owner of certain water rights, etc. (Transcript, Maney Brothers & Company, 102.) Upon the hearing in relation to this contract, Edwin D. Ford, President of the Company, testified that at the time of its execution, to-wit, August 22nd, 1910, the "said Company had actually completed nothing, but had acquired a right of way and reservoir site; that it owned the reservoir site and certain rights to waters and water appropriations; that part of Sunnyside canal or ditch belonged to that Company, but nothing had been done on their reservoir." (Transcript, 80.) This evidence is not controverted. By this contract, the Company agreed to sell and convey, and each District agreed to purchase certain percentages of interest in and to certain permits, water rights, rights of way, canals, flumes and laterals, and in all canals, pipe lines, flumes and aqueducts situate wholly without the boundaries of the District; and also the main canals, distributing laterals, pipe lines and flumes situate wholly within the boundaries of the District. (Transcript, Maney Brothers Co., 104, paragraph 2.) The Company also agreed to convey to the Districts certain percentages of interest in and to the water rights and reservoir site, excepting right of possession thereof, which was to be held until final conveyance; "and upon the completion of any portion of the said irrigation system, as shown by each monthly estimate in the construction thereof, the Company agrees to convey to the Districts such com-

pleted portion with the same proportions of the rights of way for such system; and upon the completion of the whole of such system within the time above specified, to convey the whole of the undivided interest in and to said water rights, appropriations, reservoir sites, rights of way, canals, dams, pipe lines, flumes, laterals and other structures, with the appurtenances contemplated in this agreement, and agreed to be sold and conveyed hereunder, together with the possession thereof to the District."

In consideration of the delivery by the District to the Company, coupon bonds of the face value of $100,000 and of deliveries by the District to the Company upon receipt of the conveyance above referred to, coupon bonds at face value to an amount equal to such part of the entire bond issue of the District to be sold and delivered under the contract as the constructed portion of the works of the Company bore to the entire work to be constructed for the use and benefit of the District, the Company agrees to make the aforesaid conveyances. (Paragraph 7.)

In consideration of the agreements by the Company, and in full payment of the said system to be sold and conveyed when completed as in the contract provided, the District agreed to deliver to the Company its coupon bonds at their face value to the amount of $415,000. (Paragraph 8.) It was further provided that all conveyances should be by sufficient deed, and that all properties conveyed should be free and clear of all incumbrances. (Paragraph 11, Transcript, Maney Bros. Co., 107-108-110.)

The Company agreed to furnish the District 24,900 acre feet of water each season, to be stored in the reser-

voir and to be used as desired by the District during the irrigation season as part of the consideration of the contract, with the proviso, however, that in the event of a shortage of water and the water stored should not equal the maximum amount therein under ordinary conditions in ordinary years, that the Districts should pro rate with the other tenants in common of the reservoir. (Paragraph 15.)

It was further agreed that the exclusive right to the perpetual use of all water stored in the said reservoir site at any point or points between the dam and the head gate of the main canal, was reserved to the Company, its successors and assigns forever, provided, however, that such use should not in any way interfere with the use of the said water by the District when needed for irrigation purposes (paragraph 18); and that the use of the water furnished to the Districts under the contract should be limited to the certain specified tracts included within the boundaries of the Districts as the same existed at the time of the bond issue, and against which are assessed the benefits of the system. (Paragraph 19. Transcript, Maney Bros. Co., 113-114.)

It was also agreed that the Company reserved, and should have the sole right to contract for and sell in the future, any and all water which may be needed by any lands within or without said Irrigation District as the boundaries thereof now exist, or as they may be hereafter extended, against which no benefits or merely nominal benefits are assessed, and to have the use of any canals or laterals owned by the District to transport the same under the direction of the District to the persons to whom it may sell water (paragraph 20); provision was made for the giving of bonds to each District in the

sum of $100,000 by the Company, conditioned for the faithful performance of the contract and the construction of the word. (Paragraph 27, Transcript, Maney Brothers & Co., 114-119.) A similar contract was made between the appellee, Crane Creek District, and the Company on the same date, being Exhibit "N." (See stipulation, Transcript, 73.)

By another and supplemental contract of date August 22nd, 1910, between the same parties, the Company agreed to maintain and operate an irrigation system for the period of five years from and after its completion, acceptance and conveyance to the District, and to deliver over the system at the end of the said five-year period in the condition which the plans and specifications required it to be in at the time of its completion and acceptance by the District, except ordinary use and wear thereof. (Transcript, 135.) April 2nd, 1913, the Company contracted with the Construction Company for the construction of the uncompleted portion of the system. (Bill and Answer, Transcript, 14-48.)

ASSIGNMENT OF ERRORS.

By Appellant Crane Creek Irrigation District.

I.

The United States District Court for the District of Idaho, Southern Division, erred in ordering, adjudging and decreeing that the plaintiff, Portland Wood Pipe Company, is entitled to and has a first charge and lien for the security and payment of the sums of money adjudged to be due plaintiff from the defendant, Slick Brothers Construction Company, to-wit, $9733.94, with interest thereon at 8 per cent per annum from June 24, A. D. 1914, recording and attorney's fees, aggregating in the

sum of $11,244.30, with costs, upon all the right, title and interest of this defendant, Crane Creek Irrigation District, in and to the property in said decree particularly described as constituting the irrigation system constructed by the defendant Crane Creek Irrigation Land & Power Company for this defendant, and the defendant, Sunnyside Irrigation District, and all the water rights, permits, rights-of-way, and appropriations connected with and necessary to the use of said system. For a particular description of said system and property, reference is hereby made to said decree.

II.

The said Court erred in ordering, adjudging and decreeing that the said plaintiff, the Portland Wood Pipe Company, was entitled to and had a mechanic's lien under the laws of the State of Idaho, which was a charge and lien upon the interest of this defendant in the irrigation system constructed by the Crane Creek Irrigation Land & Power Company for this defendant, and the defendant Sunnyside Irrigation District, and all the water rights, permits, rights-of-way and appropriations connected with and necessary to the use of said system. For a particular description of said system and property reference is hereby made to said decree.

III.

The said Court erred in deciding and adjudging as matter of law that material-men furnishing supplies and material for the construction of an irrigation system for the use and benefit of irrigation districts, such as this defendant, were entitled to liens as security for the value of such material, against the irrigation system, and it

erred in deciding and adjudging that the laws of the State of Idaho granted or permitted the charging of such property with mechanics' or material-men's liens.

IV.

The said Court erred in ordering, adjudging and decreeing that the said irrigation system and property be sold as an entirety and in one parcel; and in ordering, adjudging and decreeing that the said property was subject to execution or foreclosure sale.

V.

The said Court erred in adjudging and decreeing that the entire system, including its water rights, permits, rights-of-way and appropriations connected with and necessary to its use should be sold in one parcel, without valuation, or appraisement, and without provision for the application of the proceeds of the sale of the interest of the Crane Creek Irrigation, Land & Power Company in the system and property, if any there should be after satisfaction of the Maney Brothers' mortgage lien, being first applied in satisfaction of plaintiff's claim, before resort should be had to the interests of this defendant.

VI.

The Court erred in not dismissing plaintiff's bill of complaint as against this defendant, and its interest and property right in the irrigation system hereinbefore in the pleadings and decree mentioned.

Wherefore, this defendant, Crane Creek Irrigation District, prays that the said judgment and decree of the District Court of the United States for the District of

Idaho, Southern Division, be reversed, with directions to dismiss the bill of complaint of the Portland Wood Pipe Company as against this defendant, and for costs.

(Assignments of error are the same on each appeal. Transcript, 219, 224.)

ARGUMENT.

Irrigation Districts are quasi municipal corporations, organized solely for public purposes, and their property is dedicated to public uses in aid of the declared public policy of the State. The use of all waters appropriated for sale, rental or distribution, is declared to be for public use and subject to the regulation and control of the State in the manner prescribed by law.

> ("The use of all waters now appropriated, or that may hereafter be appropriated, for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use and subject to the regulation and control of the State in the manner prescribed by law.")

Idaho Constitution, Article 15, Section 1, Rev. Codes, Vol. 1, p. 127.

> ("The use of all water required for the irrigation of lands of any District formed under the provisions of this Title, together with the rights-of-way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this Title, is hereby declared to be a public use, subject to the regulation and control of the State, in the manner prescribed by law." (Rev. Codes, Sec. 2386, as amended Session Laws 1911, p. 195.)

The Districts are organized under the provisions of Title 14, Revised Codes, as amended from time to time, and their business is administered by a Board of Directors.

The directors are elected by the electors of the district, and are required to give bonds to the state.

("Sec. 2378. On the second Tuesday of December following the organization of any district an election shall be held at which shall be elected three directors by the electors of the district at large. The terms of the office of directors shall be three years. The directors shall, immediately after the first regular election following such organization, be selected by lot so that one shall hold his office for the term of one year, one for the term of two years, and one for the term of three years, and an election shall be held in each district on the second Tuesday in December of each year thereafter, at which one director shall be elected for a term of three years, or until his successor is elected and qualified. Such director must be a qualified elector and a resident of the division of the director whom he is to succeed in office. Within ten days after receiving the certificates of election hereinafter provided for, said officer shall take and subscribe the official oath, and file the same in the office of the board of directors, and execute the bond hereinafter provided for. Each member of said board of directors shall execute an official bond in the sum of five thousand dollars, which said bonds shall be approved by the judge of the probate court of said county where such organization was effected, and shall be recorded in the office of the county recorder thereof and filed with the secretary of said board. All official bonds provided for in this title shall be in the form prescribed by law for the official bond of county officers." Rev. Code. p. 199.)

("Said Board shall have the power to manage and conduct the business and affairs of the district; make and execute all necessary contracts; em-

ploy and appoint such agents, officers and employees as may be required, and prescribe their duties; and to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land as may be necessary and just to secure the just and proper distribution of the same. * * * Said Board shall also have the right to acquire, either by purchase, condemnation or other legal means, all lands and water rights and other property necessary for the construction, use and supply, maintenance, repair and improvement of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs for the storage of needful waters, and all necessary appurtenances. In case of purchase, the bonds of the district hereinafter provided for may be used to their par value in payment.

Said Board may also construct the necessary dams, reservoirs and works for the collection of water for said districts; and do any and every lawful act necessary to be done that sufficient water may be furnished to each land owner in said district for irrigation purposes." Rev. Codes, Sec. 2386; amended Session Laws 1911, 194; 1915, 308.)

Originally, the Board was forbidden to let a contract of any kind unless there should be sufficient money in the Treasury at the time of letting, available for such payment, to fully pay for the work or material so contracted for, and was restricted in the use of the District bonds to cases of purchase of its water system.

("Provided, That no contract of any kind shall be let by said Board of Directors unless there is sufficient money in the District Treasury at the time such contract is let, available for such payment, to fully pay for the work or material so contracted for." Rev. Codes, Sec. 2416, Vol. 1, p. 1019; re-enacted in amendment Session Laws 1915, 315.

"In case of purchase, the bonds of the district hereinafter provided for may be used to the par value for payment." Rev. Codes, Sec. 2386.

"The Board may sell said bonds from time to time, in such quantities as may be necessary and most advantageous to raise money for the construction of said canals and works, the acquisition of said property and rights, and otherwise to carry out the object and purposes of this Title." Rev. Codes, Sec. 2404.)

Before the contract with the Construction Company, hereinbefore mentioned, was made, it was enacted that bonds might be used in payment for construction and delivered directly to the contractor.

(Sec. 2404A. "In lieu of sale of bonds as provided in Section 2404, and the payment for construction work in cash, as provided in Section 2416 of this Title, bonds authorized by the vote of the district for the purpose of acquiring or constructing irrigation works may be issued and delivered by the board of directors directly to the contractor in payment for such construction work.") Act of March 12, Session Laws 1913, 542; new section.

The bonds issued by the Districts pursuant to the statute, and the interest thereon are paid by annual assessments upon the land in the Districts.

(Sec. 2405. "Said bonds and the interest thereon shall be paid by revenue derived from the annual assessment upon the land in the District; and all the land in the District shall be and remain liable to be assessed for such payment." Rev. Codes, Vol. 1, p. 1014.)

The Board is empowered to make assessments upon the lands within the Districts according to benefits, upon public hearing had. No State lands may be assessed, but the State Land Commissioners may contract with the Board to provide for payments out of the general fund

of the State to be applied on the cost of construction, etc.

(Sec. 2400. "After the Board shall have examined the lands in said district, and before proceeding to make the assessment of benefits * * * they shall give notice to the owners of said lands that they will meet at their office on a day to be stated in said notice for the purpose of making such assessment. * * * At such meeting the Board shall proceed to hear all parties interested who may appear, and they shall continue in session from day to day until the assessment is completed." Rev. Codes, Vol. 1.)

(Sec. 2439. "No State lands included within any legally organized irrigation district shall ever be assessed. * * * The State Board of Land Commissioners is hereby empowered to enter into a contract with the board of directors of such irrigation district * * * and such contracts shall provide that an annual payment shall be made each year out of the general fund to said board of directors to be applied on the cost of constructing such irrigation works within said district, until the full amount of such benefit is paid." Rev. Codes, Vol. 1.)

MECHANICS' LIEN LAWS DO NOT APPLY TO PUBLIC CORPORATIONS OR PROPERTY DEDICATED TO PUBLIC USES, UNLESS THE LEGISLATURE BY STATUTE SHALL EXPRESSLY PROVIDE FOR SUCH LIENS, SINCE PUBLIC PROPERTY OR PROPERTY DEDICATED TO PUBLIC USES IS NOT INCLUDED WITHIN THE PURVIEW OF SUCH STATUTES BY IMPLICATION.

There is no such statute in Idaho.

The following is the text of the Sections of Idaho Codes applicable here:

(Sec. 5110. "Every person performing labor upon, or furnishing materials to be used in the con-

struction, alteration, or repair of, any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent." Rev. Codes, Vol. 2, p. 306.

Sec. 5111. "Every sub-contractor and laborer or other person, who performs labor, or furnishes material for any original contractor or sub-contractor, to be used in the construction, alteration or repair of any building, machinery or other structure, for any county, city, town or school district, has a lien upon such building, machinery or structure, and all the provisions of this chapter respecting the securing and enforcing of mechanics' liens shall apply thereto so far as applicable." Rev. Codes, Vol. 2.)

The Legislature has here expressly designated the particular public corporations which shall be subject to the mechanics' lien laws. Irrigation districts are not included, and in accordance with the elementary rule of construction, must be held not to be within the statute.

Boisot Mech. Liens, Sec. 208, Sec. 188;

Dillon Municipal Corporations, 4th Ed., Vol. 2, Sec. 572;

Dillon Municipal Corporations, 4th Ed., Vol. 3, Sec. 993;

Phillips Mech. Liens, 3rd Ed., Secs. 179-180;

Cyc., Vol. 27, p. 125;

Buncombe Co. Commrs. v. Tommey, 115 U. S. 122;

McNeal Pipe & Foundry Co. v. Bullock, 38 Fed. 565;

Guest v. Merion Water Co., 142 Pa. St. 610, 21 Atl. 1001;

Foster v. Fowler, 60 Pa. St. 27;

First Nat. Bk. of Idaho v. Malheur Co. (Or.), 35 L. R. A., and note;

Hutchison v. Krueger, et al., 34 Okla. 23, 124th Pacific 591.

In the case of Hutchison v. Krueger, *supra*, there is an exhaustive review of the authorities upon this question. The Court said:

> "The general rule that a lien will not lie against public property devoted exclusively to public use, has been almost universally adopted in the various states of the union, and has been announced by all of the American text-writers discussing mechanics' liens whose work we have been able to examine. Boisot on Mechanics' Liens at Sec. 208: 'There can be no mechanics' lien on public property unless the statute creating such lien expressly so provides, since such a lien would be contrary to public policy, and also would be incapable of enforcement; public property not being subject to forced sale. For this reason there can be no mechanics' lien on a county court house nor on county buildings.'"

The Court reviews the cases and quotes therefrom to a like effect.

So far as we know, the Supreme Court of Idaho has not passed upon the question here involved. It has held that in cases arising under the Carey Land Act, the State under the statutes was authorized to contract with individuals and private corporations for doing construction work, and that both an Act of Congress and an Act of the State Legislature authorized the charging of interests of contractors in the property with liens, etc., saying:

> "It should be borne in mind, however, that under the act of Congress and the state statute above cited, both the general government and the state legislature have granted the right of lien upon

lands to be irrigated to any person, association or corporation taking a contract from the State to the extent of 'the actual cost and necessary expenses of reclamation.' The act of the Legislature, in conformity with the act of Congress, has granted a lien to 'any person, company, or association, furnishing water for any tract of land,' for the expense of the construction of the works, or rather to the extent of the price allowed to be charged for the water right for each acre of land. Under this enactment of the state Legislature, it is clear to us that the contractors and sub-contractors, under a construction company like the appellant, would be entitled to avail themselves of the benefit of the lien laws of the state; and that in case of foreclosure and sale under the lien they would be entitled to sell all the right, interest, and claim of the construction company; and that the purchaser at such foreclosure sale would be subrogated to all the rights, interests and privileges of the construction company therein. If it be conceded by appellant that it has no interest in or title to any of this property, and no right of possession thereto, then we grant that the respondent can sell nothing at a foreclosure sale. * * * The appellant is not the representative of either the state of Idaho or the general government, and is in no position to present the interests of either here, and cannot complain for or on account of any pretended claim that may be preferred against either."

Nelson Benett Co. v. Twin Falls Land & Water Co., 14 Ida., p. 5, 93 Pac. 789, 792;

Hill v. Twin Falls L. & W. Co., 22 Ida. 274, 125 Pac. 204.

The State statute referred to in the opinion is as follows:

("The water rights to all lands acquired under the provisions of this Act shall attach to and become appurtenant to the land as soon as title passes

> from the United States to the state. Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right.")

Section 20, Act March 3rd, 1899, Session Laws 1899, p. 456.

The Court in adjudging a lien in favor of a contractor in the case last above cited placed its decision upon statutes of the state and the United States *expressly* creating the lien. The lien there enforced was only upon the land and water right of the individual owner, and restricted to the "person, company or association furnishing water for any tract of land."

This court followed these decisions in Continental etc. Bank v. Corey Bros. Const. Co., 208 Fed. 976.

The irrigation districts, appellants in the instant case, were created for the express purposes of administering a great public trust. In aid of this purpose, the law contemplates the construction and maintenance of a *system* comprising reservoirs, dams, canals, pipe lines, flumes, ditches, etc., and as necessary incidents, the ownership of rights to water. This system may not be segregated into its component parts—its ownership or control can not be separated nor sold, and the administration of the trust be thus committed to others than the trustees appointed by law.

A clear and comprehensive statement of the legal *status* of irrigation districts is found in the opinion of the Supreme Court of California, In re Bonds of Madera Irrigation District, 92nd California 296-322, 28th Pacific 272, wherein, in construing similar statutes, *inter alia*, it is said:

"When organized, the district can acquire, either by purchase or condemnation, all property necessary for the construction of its works, and may construct thereon canals, and other irrigation improvements; and all the property so acquired is to be held by the district in trust, and is dedicated for the use and purposes set forth in the act, and is declared to be a public use, subject to the regulation and control of the state. For the purpose of meeting the cost of acquiring this property, the district is authorized upon the vote of a majority of its electors, to issue its bonds, and these bonds, and the interest thereon, are to be paid by revenues derived under the power of taxation, and for which all the real property in the district is to be assessed. Under this power of taxation, one of the highest attributes of sovereignty, the title of the delinquent owner to the real estate assessed, may be divested by sale, and power is conferred upon the board of directors to establish equitable by-laws, rules, and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purpose of the act. Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is *in trust for the public, and subject to control of the state.* Its officers are public officers chosen by the electors of the district, and invested with public duties. Its object is for the good of the public, and to promote the prosperity and welfare of the public." (Italics ours.)

The foregoing is quoted at length with approval by the Supreme Court of Idaho in Pioneer Ir. Dist. v. Walker, — Idaho —, 119 Pacific 307.

In recognition of the justice of claims of contractors who should furnish materials and perform work upon irrigation systems to be acquired by irrigation districts, the legislature, in the year A. D. 1909, enacted a statute,

entitled, "An Act for the protection of persons furnishing materials and labor for the construction, alteration or repair of public buildings and works," as follows, to-wit:

"Section 1. That hereafter any person or persons entering into a formal contract with the state, any county, city, town, school or irrigation district, or any quasi public corporation of the state, for the construction, alteration, or repair of any public building, public work, or quasi public work, the contract price of which exceeds the sum of $200.00, shall be required before commencing such work, to execute the usual penal bond, in a sum equaling sixty per cent at least, of the contract price, to be approved by the officer, board or body authorized to make such contract, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company or corporation who has furnished labor or material used in the construction, alteration or repair of any public building, public work or quasi public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due to the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, the remainder shall be distributed pro rata among said interveners.

If no suit should be brought by the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit that labor or materials for the prosecution of such work has been supplied by him or them, and payment for it has not been made, be furnished, without cost to him or them, with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, for his or their use and benefit, against said contractor and his surety, and to prosecute the same to final judgment and execution: *Provided,* That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided, further,* That where a suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amount found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court for distribution among said claimants and creditors, the full amount of the surety's liability, to-wit: the penalty named in the bond, less any amount which said surety may have had to pay to the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, by reason of

the execution of said bond, and upon so doing, the surety will be relieved from further liability: *Provided, further,* That in all suits instituted under the provisions of this act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto, notice by publication in some newspaper of general circulation, published in the county where the contract is being performed, for at least three successive weeks, the last publication to be at least one month before the time limited therefor.

Section 2. "Except when the contract price is $200.00 or less, it shall be unlawful for any officer of the state, county, city, town, school or irrigation district, or quasi public corporation, as the case may be, to allow any claim for money, or to pay out and disburse any money to any person on account of any contract for the construction, alteration or repair of any public building, public work, or quasi public work, until a good and sufficient bond, as provided in section one of this act, is furnished and provided." Session Laws, 1909, 165.

By this law, the Legislature has expressly provided for the security of persons furnishing material and labor for the construction of public works, including "irrigation district," thereby clearly indicating an intention to continue its existing policy of excluding the property of such public corporation from the operation of the lien laws of this state. It provided a bond for the protection and payment of material men and labor who should furnish materials and perform labor on public works of this character, and since mechanic's liens only exist in this country by force of the statutes creating them (Boisot, Mechanic's Liens, pp. 4, 5), payment of such claimants can only be enforced in the way and by the means provided by the statute. The learned judge of the

court below found a difficulty in believing that there was an intention of the Legislature to withhold the right of lien in the case of an irrigation district, but concluded that question was not involved in this case. He was of the opinion that the material furnished by the appellant was for the construction of the works belonging to the Company and not to the irrigation districts, and while admitting that the system was to be conveyed to the districts, assumed that the law was so understood by the districts that they could not contract to pay bonds for construction of irrigation works, and therefore intended the construction should be for the Power Company and that they would buy the completed structures. His conclusion was, that being the case, the districts took the title subject to such liens as incumbered the property when it came into ownership and possession of the Company, which must have acquired title subject to the liens of the workmen and material men. He thought the districts should not be permitted to take an inconsistent position, and that the nature of the contract aforesaid advised appellant that districts did not claim to own the property and that the Power Company was merely a construction company, and applying the doctrine of equitable estoppel, reasoned that the districts having held out to the world that they were merely the purchasers of the property and were not engaged in construction, could not change their position "to the hurt of persons who in good faith dealt with the Power Company as the owner of the property." (Transcript, 188-9.)

As we have heretofore shown in this brief, the districts did require surety bonds pursuant to the statute, and such bonds were given. The contract with the Company was a contract for construction and conveyance, and

contemplated finally taking over the entire property by the district. These districts being public corporations, their officers are public officers.

In re Madera Irrg. Dist., 92 Cal. 296;

Peoo v. Semple Dis., 98 Cal. 206;

Fairbrooke Irrg. Dist. v. Bradley, 164 U. S. 174.

The California Court, in another case, held that the name of the district, it having by that name a prima facie legal existence by the official record of its organization, is a sufficient identification of its boundaries, and that "all persons were required to take notice of the facts shown by the record of its organization."

Fogg. v. Perris Irrg. District, 154 Cal. 209, 97 Pac. 316.

And the Supreme Court of Idaho has held to the same effect.

(Little Willow Irrigation District v. Haynes, — Ida. —, 133 Pac. 906.)

With all other persons, the Appellee in this case was bound to take notice of the legal status of the districts, and of the fact that its directors were public officers and of all the limitations upon their authority in the execution of their duties and the trusts imposed upon them. Such officers can not by conduct raise an estoppel, equitable or otherwise, which shall foreclose and bind the property of the district. They could not even by specific contract charge a lien against the property in their care in the absence of express legislative authority.

They could not directly or indirectly admit others in to the control or administration of the trust imposed upon them. The district corporations were created for most important public work, to-wit, the appropriation of

the public waters of the state to the cultivation of its lands, with the ultimate purpose in view of furnishing homes for the people and developing the resources of the state. The state, itself, has declared the trust and appointed the trustee to administer it. As said by the Supreme Court of California in a case presenting questions fairly analogous to those in the case at bar:

> "The trust thereby imposed upon the municipal government was public and could neither be delegated nor abdicated."
>
> (City of Oakland v. Oak. Front Co., 118 Cal. 160, 50 Pac. 277, 288.)

And the Supreme Court of Idaho has said:

> "A contract by the board of directors of such a district, giving to others the management or control of any part of the system and taking that management out of the control of the hands of the district board, would be ultra vires and void."
>
> (Colburn v. Wilson, — Ida. —, 130 Pac. 381.)

The appellee, therefore, is conclusively charged with notice of all the acts of the directors of appellants in the matter of contracts for the construction and purchase of the irrigation system, together with all limitations upon their authority. It is familiar law that all persons dealing with municipal corporations (or other public officers), are charged with knowledge of the limitations upon the power of their officers.

> "Since the authority of public officers can only be created by law, and is, therefore, a matter of public record, all persons dealing with them are bound to take notice of its existence and must ascertain that it is sufficient in assumed use. Their power and authority is specific and limited, not general, and their right to act in a spe-

cific instance must be ascertained and determined by an inspection of the law so created, strictly."

Abbott Municipal Corporations, Vol. 2, pp. 50-62;

Hughston v. Crane, 115 Cal. 404.

"A public corporation which has acquired property as a trustee for the public can not act in such a manner as to deprive the public or its individual members of their personal or collective rights in the use of that property.

The public corporation acts solely as a trustee; the community is regarded as a *cestui qui trust*. An action inconsistent with or contrary to this relation will be regarded as illegal."

(Abbott Munic. Corps., Vol. 3, Sec. 936, p. 2191.)

It knew, or should have known, that the contract made with the Company contemplated from time to time the conveyance of the completed portions of the work and the payment therefor of a specific sum of money in bonds at their par value, as the entire consideration for the system; that at the time it began to furnish materials, to-wit, the 14th of February, A. D. 1914, bonds in payment of the par value of $520,315 had been delivered by or for the Company; that it could not, under the law, charge a lien against any portion of the system, and that its remedy, in default of the payment by the Construction Company, was an action upon the surety bonds required and given pursuant to the statute. It further knew, that the directors or other officers had no power to incur any debt or liability in excess of the express statutory provisions.

(Sec. 2392. "The board of directors, or other officers of the district, shall have no power to incur any debt or *liability* whatever, either by issuing

> bonds or otherwise, in excess of the express provisions of this title; and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void; provided, that for the purpose of organization or for any of the purposes of this title, the board of directors may, before the collection of the first assessment, incur any indebtedness not exceeding in the aggregate the sum of $2,000, and may cause warrants of the district to issue therefor, bearing interest at 7%.") Rev. Codes, Vol. 1, p. 1005.

There can be no question about the power of irrigation districts to negotiate for water systems in advance of their total completion. This is clearly evidenced in the language employed in Rev. Codes, Sec. 2386, authorizing the directors to acquire all lands and water rights and other property necessary for the construction, use and supply, etc., of canal or canals and works, "including canals and works constructed and being constructed by private owners." Construing a similar statute, the Supreme Court of California said:

> "By the use of the words 'works constructed and being constructed,' the legislature clearly indicated its intention to authorize districts to negotiate for water systems in advance of their total completion."
>
> Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248-251.

The conclusion is irresistible, it would seem, that no right of lien against the physical property of an irrigation district, necessary for the uses dedicated to the public, can be acquired by the means of an equitable estoppel founded upon the conduct—word or act—of the officers charged with the administration of the affairs of the district.

Such a right could not be asserted pursuant to an

express agreement by the officers of the districts. This must be true, since, in the last analysis, the assertion of the right involves, as in the instant case, a sale of the property to strangers to the trust. If it be said that the purchaser would be bound to administer the trust as directed by the law of its creation, the answer is, that a new trustee has been appointed by the act of the parties, and confirmed by the court, who is prohibited by law from intruding into the office.

> "A contract by which officers and directors of an irrigation company attempted to divest themselves of the possession and control of the company's property and to transfer it to individuals, is *ultra vires.*"
>
> Arno Co-operative Irrg. Co. vs. Pugh, Texas Appeals, 177 S. W. 991;
>
> Colburn vs. Wilson, *supra.*

But, there is no authority given in the statutes relating to execution or foreclosure sales, to sell property of this class. If there were, the consequences would be far-reaching and irreparable. Necessarily the purchaser would be vested with a title to the physical property, and if the sale was to be effective he would have to acquire the franchises vested in the district to sell and distribute water. There is no authority in the law for the districts here to pay the money judgment given against their property, nor to redeem from a foreclosure sale with either bonds or money, since their powers in the matter of construction or purchase have been exhausted.

The theory of the court below, that, under the original contract with the Company, the appellants took title to the completed work subject to such liens as incumbered the property when it came into the possession and ownership of the Company, and that the Company acquired

title to the property subject to the liens of the workmen who built it and the material men who furnished the material for its construction, is, with all deference be it said, unsound. It excludes from consideration the statutes which, as hereinbefore shown, do not give the lien, but on the contrary indicate unmistakably the intention of the legislature to preserve the property clear of liens of any kind.

The cases cited to sustain such conclusions, we think, do not support it.

(Greer vs. Cache Valley Canal Co., 4th Ida. 280; 38 Pac. 653;
Garland vs. Irrg. Co., 9 Utah 35; 34 Pac. 368;
Fosdick vs. Schall, 99 U. S. 235;
Holt vs. Henley, 232 U. S. 637.)

The cases from the state courts involved only the rights of lien against *private* corporations, and those in the supreme court only determined the status of the property passing by conditional sales with right of recission in case of the failure of purchasers to complete the payments.

Upon the whole case, it is submitted, that the court below erred in adjudging a lien against the property of appellants and in directing a sale of said property and not dismissing plaintiff's bill of complaint; and appellants severally pray that the decree of said court be reversed, with directions to dismiss the bill of complaint of appellee—Portland Wood Pipe Company, as against each of appellants, and for costs.

Respectfully submitted,

C. S. VARIAN,

E. R. COULTER,

Solicitors for Crane Creek Irrigation District and Sunnyside Irrigation District, Appellants.